

COMMISSIONED ARTIST AGREEMENT

Public Safety Memorial
Tempe Beach Park Location

This Commissioned Artist Agreement (“Agreement”) is by and between the City of Tempe, an Arizona municipal corporation (“City”) and Benjamin Victor of Benjamin Victor Studios Inc., (“Artist”) for the performance of certain tasks and the production of art as specified in this Agreement.

In consideration of the mutual promises and agreements hereinafter contained, the parties agree as follows:

1. **INDEPENDENT BUSINESS.** The Artist declares that Artist is engaged in an independent business and holds services out to the public as a separate business entity from the City, and is not in business for the purpose of providing services solely to the City.
2. **COMPLIANCE WITH LAWS.**
 - A. Artist agrees and covenants that it will comply with any and all applicable governmental restrictions, regulations and rules of duly constituted authorities having jurisdiction insofar as the performance of the work and services pursuant to the Agreement, and all applicable safety and employment laws, rules and regulations, including but not limited to, the Fair Labor Standards Act, the Walsh-Healey Act, and the Legal Arizona Workers Act, and all amendments thereto, along with all attendant laws, rules and regulations. Artist acknowledges that a breach of this warranty is a material breach of this Agreement and Artist is subject to penalties for violation(s) of this provision, including termination of this Agreement. City retains the right to inspect Artist’s documents as well as those of any and all subcontractors and sub-subcontractors performing work and/or services relating to the Agreement to ensure compliance with this warranty. Any and all costs associated with City inspection are the sole responsibility of Artist. Artist hereby agrees to indemnify, defend and hold City harmless for, from and against all losses and liabilities arising from any and all violations thereof.
 - B. The Artist further agrees to insert the foregoing provisions in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials. Any violation of such provisions shall constitute a material breach of this Agreement.
3. **PROJECT DESCRIPTION AND SCOPE OF WORK.**
 - A. The project, artwork and services provided shall be known as the Public Safety Memorial Project (“Project”).

B. The scope of work for the Project shall be as follows:

i. After the Project design has been approved by the City, the Artist is required to provide construction oversight for the fabrication, delivery and installation of the Project's designs and artwork.

ii. The Artist shall produce construction documents for artwork, landscape and other site elements designed for the Project. Payment for any sub-consultants to produce construction documents including the structural engineer shall be the sole responsibility of the Artist.

4. SERVICES TO BE PERFORMED.

A. The City engages Artist to perform the following tasks and services:

i. Through a competitive process, the City selected the Artist to complete the Project.

ii. The Artist shall be required to make up to four presentations as determined by City.

B. Prior to commencing work under this Agreement:

i. Submit the required certificate of automobile insurance to the City.

ii. Submit the required certificate of commercial liability insurance to the City.

iii. Submit the Affidavit Demonstrating Lawful Presence in the United States to the City.

C. Task One: City Council approval of Contract

D. Task Two: Completion and approval of police officer, fire fighter and canine full-sized clay sculptures.

E. Task Three: Completion and approval of construction drawings of the site, submission of finalized timeline with selected contractors listed for landscaping, electrical, flagpole, pedestals and associated foundations.

F. Task Four: Completion and approval of the Project; three bronze sculptures installed and site work completed by December 6, 2016. Such site work to be as follows: landscape, lighting, flagpole, commemorative and donor recognition pedestals.

5. TERMS OF PAYMENT. City shall pay Artist a total payment of Three Hundred and Fifty Thousand, Dollars (\$350,000.00), which shall constitute payment in full for management of the Project, Project design, fabrication, transportation, delivery and installation costs, subcontractor and consultant fees including any engineers or fabricators, permit and license fees, insurance, labor, supplies, travel and all other costs and expenses needed to complete the Project. Payment shall be inclusive of all costs, including delivery. Upon City's approval of work and invoice, the City will make payment within thirty (30) days of its approval of work and invoice.

- i. Artist shall receive Seventy Eight Thousand Dollars (\$78,000.00) upon completion of Task One, based upon City approval of work and billings, and approval of an invoice.
 - ii. Artist shall receive Seventy Eight Thousand Dollars (\$78,000.00) upon completion of Task Two, based upon City approval of work and billings, and approval of an invoice.
 - iii. Artist shall receive Seventy Eight Thousand Dollars (\$78,000.00) upon completion of Task Three, based upon City approval of work and billings, and approval of an invoice.
 - iv. Artist shall receive One Hundred and Sixteen Thousand Dollars (\$116,000.00) upon completion of Task Four, based upon City approval of work and billings, and approval of an invoice.
6. CONTROL. Tasks and services described in Sections 3 and 4 shall be performed by the Artist. Any work done by assistants, other persons, sub-contractors, or other means must be under the direct control and supervision of the Artist. Quality of all work is subject to approval by City.
7. INDEPENDENT CONTRACTOR RELATIONSHIP. The relationship between Artist and City is that of an independent contractor and nothing contained in this Agreement shall be construed as establishing an employer/employee relationship, partnership or joint venture, between City and Artist, or cause City to be responsible in any way for the debts or obligations of Artist.
8. INSTRUMENTALITIES. The Artist shall supply all equipment, tools, materials and supplies to accomplish the designated tasks and services.
9. WARRANTY. Artist warrants to the City that the bronze artwork and site work will be performed in a workmanlike manner and that the work will be free of defects in workmanship or materials, and that the Artist will, at the Artist's own expense, remedy any defects found in the Project, due to faulty workmanship or materials for a period of one year after the Project is accepted by the City.
10. COPYRIGHT AND USE.
 - A. The Artist warrants that the Project components being commissioned and produced under this Agreement are the original product of his own creative efforts, the works are unique, they have not been accepted for sale elsewhere, and that the Project components shall not be offered for sale elsewhere without the express approval of the City.
 - B. The Artist shall ensure that the Project components contain no material from other artworks or other copyrighted material without the prior written permission of the owner of such material where such other work is copyrighted or where such permission is otherwise required. Such permissions shall be obtained by the Artist in form and content acceptable to the City.
 - C. The Artist retains the copyright for all artwork including designs, sketches, models and any other completed artwork created and submitted by the Artist to the City under the terms of this Agreement.

- D. The Artist grants a perpetual, irrevocable, royalty-free, worldwide, nonexclusive, sublicensable right and license to the City to photograph, film, video or otherwise reproduce images of, in any media now known or hereafter invented, the Project for awards, publications, public programs, publicity, promotion, research, postcards, prints, posters, and all 2 dimensional formats, including but not limited to electronic distribution on City websites and on television or other media that City contracts with in connection with the business and services of City and any resulting exhibitions, all in perpetuity without additional compensation by City to Artist.
 - E. Should the City or its agents seek to create and sell miniature versions of the Project or any of its individual components (e.g. the police officer, the fire fighter, the canine), Artist may allow such derivative works under mutually agreed upon terms in a separate written agreement between the parties. The City Manager or designee will have the authority to negotiate such terms and enter into such written agreement.
 - F. Upon any publication or derivative work, the City will use its best efforts to assure that the Artist is given customary and appropriate identification as the artist.
 - G. USEFUL LIFE OF PROJECT: Artist acknowledges and agrees that the Project may be destroyed at any time, and for any reason, in City's sole discretion.
 - H. VISUAL ARTISTS RIGHTS ACT. To the extent that Artist may have rights in the Project subject to the Visual Artists Rights Act (VARA), Artist hereby assigns to City and/or waives any and all notification rights and moral rights in connection with the Project. As owner of the Project and the property on which the Project will be placed, the City retains full authority and ability to move the Project and modify the pedestals that are a part of the project.
11. TITLE TO WORK. Artist agrees that the Project is not "site-specific" art. Artist acknowledges and agrees that the City may also remove the Project from Tempe Beach Park and relocate it elsewhere in the future.
12. MAINTENANCE AND REPAIRS.
- A. The Artist shall supply the City with maintenance instructions and instructions on how to make changes to the pedestals. The City will ensure the Project is reasonably maintained and protected to the extent practical as determined by the City in its sole discretion. The Artist further warrants that Artist will supply at no charge, advice to City as to problems arising in relation to maintenance or changing the pedestals of the Project. Except as set forth herein, the Artist shall incur no cost to himself as a result of giving said advice.
 - B. The City may consult with the Artist concerning repairs to the Project or changes to the pedestals. To the extent practical as solely determined by the City, the Artist shall be given the opportunity to accomplish repairs or make changes to the pedestals at a reasonable fee. The City reserves

the right to obtain competitive bids and to choose the highest quality and least expensive vendor for all repairs to and/or restoration of the Project. This right shall remain in place during and shall survive the term of this Agreement.

13. TERM AND SURVIVAL. This Agreement shall be in full force and effect only when it has been executed by the duly authorized representatives of the Artist and the City. This Agreement will remain in effect until cancelled by Artist or terminated by the City or when the Project has been completed. If the Agreement is cancelled or terminated, any terms or provisions herein intended to survive said cancellation or termination, including Sections 2(a), 9, 10, 11, 12, 15, 20, 26, and 27 shall survive.
14. LICENSES AND TAXES.
 - A. No payroll or employment taxes of any kind shall be withheld or paid with respect to payments to Artist. The payroll or employment taxes that are the subject of this paragraph include, but are not limited to FICA, FUTA, federal personal income tax, state personal income tax, state disability insurance tax and state unemployment insurance tax.
 - B. Prior to commencing work under this Agreement, the Artist will contact the City of Tempe Audit and License Division and the Arizona Department of Revenue and either obtain any and all applicable tax license(s) or obtain letters from the tax departments confirming that no tax license(s) is required and that no privilege, sales, use or excise tax will be owed by the Artist in relation to his or her work performed under this Agreement. Artist will be responsible for reporting and paying any applicable sales, privilege, use or excise tax which may be payable in relation to this Agreement. The City is not to be invoiced nor will it pay any said taxes.
15. CLAIMS AGAINST THE CITY. To the fullest extent permissible by law, the Artist shall defend, indemnify, save, and hold harmless the City, its departments, agencies, officers and employees from any and all claims or damages that arise from the negligent or wrongful performance of professional services performed under this Agreement. These services are to be performed in accordance with the standards of Artist's profession in his appropriate capacity. In addition, the Artist shall indemnify and hold harmless the City for any error, omission or negligent act of any person employed by Artist or others for whose acts Artist may be held liable. This provision shall survive the terms of this Agreement.
16. INSURANCE.
 - A. *Minimum Scope and Limits of Insurance*: Artist shall provide insurance coverage with limits of liability not less than those stated below. An excess liability policy or umbrella liability policy may be used to meet the minimum liability requirements provided that the coverage is written on a "following form" basis.
 - B. *Commercial General Liability – Occurrence Form*

Policy shall include bodily injury, death, property damage, products/completed operations, personal and advertising injury and broad form contractual liability coverage covering, but not limited to, the liability assumed under the indemnification provisions of this Agreement in the minimum amounts as follows:

General Aggregate	\$2,000,000
Products – Completed Operations Aggregate	\$1,000,000
Personal and Advertising Injury	\$1,000,000
Each Occurrence	\$1,000,000

Coverage will be at least as broad as Insurance Services Office, Inc. policy form CG 00 01 10 01 and CG 20 37 07 04 or equivalent thereof, including but not limited to severability of interest and waiver of subrogation clauses.

C. *Worker's Compensation and Employer's Liability.*

If applicable, Artist shall maintain Workers' Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction over any of Artist's employees engaged in the performance of work or services; and Employer's Liability insurance in the minimum amount as follows:

Each accident	\$1,000,000
Disease coverage for each employee	\$1,000,000
Disease policy limit	\$1,000,000

In case any work is subcontracted, Artist will require the subcontractor to provide Worker's Compensation and Employer's Liability to at least the same extent as required of Artist.

D. If Artist owns or operates vehicles in Arizona, Artist shall maintain Automobile Liability insurance with a combined single limit for bodily injury and property damage of not less than \$300,000 each occurrence with respect to any owned, hired, and non-owned vehicles assigned to or used in performance of Artist's work. Any combination between automobile liability and excess liability alone amount to a minimum of \$ 1,000,000 per occurrence in coverage will be acceptable. Coverage shall be at least as broad as coverage Symbol 1, "any auto" (Insurance Service Office, Inc. Policy Form CA 0001 0306, or any replacements thereof).

E. *Additional Insurance Requirements.* Except for workers compensation, the policies shall include, or be endorsed to include, the following provisions:

- i. The certificate of insurance provided shall include City, its agents, representatives, officials and employees, as additional insureds, and shall specify that insurance afforded by the Artist shall be primary insurance and that any insurance coverage carried by the city or its employees shall be excess coverage and not contributory coverage to that provided by the Artist. This shall not be construed as giving rise to responsibility or liability of City for applicable deductible amounts under such policy(ies). Any deductible or self-insured retention shall be assumed by and be for the account of, and at the sole risk of Artist

who shall be solely responsible for the deductible and/or self-insured retention.

- ii. Artist shall obtain Endorsement CG 20 10 10 01 or the equivalent as evidence of the City being a named insured.

F. *Notice of Cancellation.* For each insurance policy required by the insurance provisions of this Agreement, Artist must provide to City, within ten (10) business days of receipt, a notice if a policy is suspended, voided or cancelled for any reason. Such notice shall be mailed, emailed, or hand delivered to City of Tempe, Tempe Public Art, 3500 South Rural Road, Tempe, AZ 85282.

G. *Acceptability of Insurers.* Insurance is to be from companies possessing a current A.M. Best, Inc. rating of A-VII, or better and legally authorized to do business in the State of Arizona. City in no way warrants that the above-required minimum insurer rating is sufficient to protect Artist from potential insurer insolvency.

H. *Verification of Coverage.* Prior to commencing activities and services under this Agreement, Artist shall furnish City with certificates of insurance (ACORD form or equivalent approved by City) and any applicable endorsements as required by this Agreement. All certificates of insurance shall identify the policies in effect on behalf of Artist, their policy period(s) and limits of liability. The certificates for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. All initial and renewal certificates and any required endorsements are to be sent directly to the following:

City of Tempe
Tempe Public Art
3500 South Rural Road
Tempe, AZ 85282
Phone (480) 350-5160

The amounts of any self-insured retentions and a descriptive identifier of the Project are to be noted on the certificate of insurance. If a policy does expire during the Term of this Agreement, a renewal certificate showing a new policy must be sent to City ten (10) business days prior to the expiration date.

I. *Contractors and Subcontractors Insurance.* When applicable, Artist shall require that each and every one of its contractors and subcontractors who perform work carry, in full force and effect, workers' compensation, commercial general liability, including fire damage, pollution liability and automobile liability insurance coverages of the type, with the restrictions and in the amounts which Artist is required to obtain under the terms of this Agreement. Artist undertakes and assumes for its officers, agents, employees, contractors and subcontractors all risk of dangerous conditions, if any, on or about City property.

17. WORKERS' COMPENSATION. No workers' compensation insurance has been or will be obtained by the City for the Artist. Artist shall carry workers' compensation and employer's liability insurance to cover obligations imposed by federal and state

statutes having jurisdiction of Artist's employees engaged in the performance of services under this Agreement.

18. SAFETY. The Artist shall be solely and completely responsible for conditions on any job site over which he has oversight responsibility, including the safety of all persons (including employees) and property during performance of the work. This requirement shall apply continuously and not be limited to normal working hours. Safety provisions shall conform to all applicable federal (including OSHA), state, county and local laws, ordinances, codes and regulations. Where any of these are in conflict, the more stringent requirement shall be followed. The Artist's failure to thoroughly familiarize them self with the aforementioned safety provisions shall not relieve them from compliance with the obligations set forth therein.
19. COMMUNICATIONS. Any communications and/or deliverables required under this Agreement shall be deemed sufficiently given when personally delivered or mailed via e-mail, US Certified Mail, return receipt requested, and addressed as follows (or to any other address agreed upon in writing by both parties):

To City: Tempe Public Art, City of Tempe
 3500 South Rural Road
 Tempe, Arizona 85282
 480-350-5160
 Maja_Aurora@tempe.gov

To Artist: Benjamin Victor Studios Inc.
 Boise State University
 1910 University Dr. MS 1137
 Boise, ID 83709
 (605) 380-4528
 bvictor@benjaminvictor.com

20. DISPUTE RESOLUTION. In the event of a dispute concerning this Agreement, the parties will meet in good faith to resolve the dispute. In addition, if any person should institute a claim or action against the Artist in which City is made a party defendant, Artist shall indemnify, defend and hold City harmless for, from and against all liability by reason thereof, including reasonable attorney's fees and all costs incurred by City in such action.
21. DEFAULT.
 - A. The occurrence of any or more of the following events shall constitute a material breach of and default under the Agreement.
 - i. Any failure by Artist to observe, perform or undertake any provision, covenant or condition of this Agreement to be observed or performed by Artist herein;
 - ii. Any failure to make progress in the performance required pursuant to the Agreement and/or gives the City reason to believe that Artist cannot or will not perform to the requirements of the Agreement; or,

- iii. Any failure of Artist to commence work or services to be provided within the time specified herein, and to diligently undertake Artist's work to completion.
 - iv. Upon and during the continuance of an event of default, City, at its option and in addition to any other remedies available by law or in equity, without further notice or demand of any kind to Artist, may terminate this Agreement.
- B. Upon and during the continuance of an event of default, City, at its option and in addition to any other remedies available by law or in equity, without further notice or demand of any kind to Artist, may do the following:
- i. Terminate the Agreement;
 - ii. Pursue and/or reserve any and all rights for claims to damages for breach or default of the Agreement; and/or,
 - iii. Recover any and all monies due from Artist, including but not limited to, the detriment proximately caused by Artist's failure to perform his or her obligations under the Agreement, or which in the ordinary course would likely result therefrom, including, any and all costs and expenses incurred by City in (a) maintaining, repairing, altering and/or preserving the Project; (b) costs incurred in selecting and retaining substitute artist for the purchase of services, materials and/or work from another source; and (c) attorneys' fees and costs in pursuing any remedies under the Agreement and/or arising therefrom. The exercise of any one of City's remedies shall not preclude subsequent or concurrent exercise of further or additional remedies.

22. RIGHT OF TERMINATION.

- A. City and the Artist hereby agree to the full performance of the covenants contained herein, except the City reserves the right, at its discretion, to terminate or abandon all or any part of the Project at any time. In the event the City shall terminate or abandon the service or any part of the services as herein provided, the City shall notify the Artist in writing, and immediately after receiving such notice, the Artist shall discontinue working under this Agreement.
- B. In the event of death or incapacity of the Artist, the City shall reserve the right to terminate this Agreement.
- C. The Artist shall have the right to cancel the Agreement within thirty (30) days after notice in writing to the City for non-payment.
- D. This Agreement may be canceled pursuant to the provisions of A.R.S. § 38-511.

23. ENTIRE AGREEMENT. This Agreement shall constitute the entire agreement between the parties hereto. No oral representation has been made by any of the parties. This Agreement may not be amended, changed, modified or rescinded

except in writing signed by all parties hereto and any attempt at oral modification of this Agreement shall be void and of no effect.

24. SUCCESSORS AND ASSIGNS. This Agreement shall not be assignable except at the written consent of the parties hereto.
25. FORCE MAJEURE. If either party shall be delayed or prevented from the performance of any act required under this Agreement by reason of acts of God or other cause, including delays in schedule not caused by, beyond the control of and without fault of the Artist (financial inability excepted), performance of that act shall be excused, but only for the period of the delay. The time for performance of the act shall be extended for a period equivalent to the period of delay.
26. GOVERNING LAW. This Agreement shall be governed by and construed under the laws of the State of Arizona and venue for any litigation related to this Agreement shall be in Maricopa County, Arizona.
27. RETENTION OF RECORDS. City, through any authorized representative, will have access to and the right to examine and copy all records, books, papers or documents related to services rendered under this Agreement. Artist will retain all books and records related to the services performed for a period of not less than the greater of any applicable law retention requirement or five (5) years following termination of this Agreement.
28. TIME IS OF THE ESSENCE. Time is and shall be of the essence in this Agreement, and for each and every provision of this Agreement. City reserves the right to terminate this Agreement and hold Artist liable for reasonable costs of recovery, excess cost or damage incurred as a result of delay.
29. HEADINGS, CONSTRUCTION OF LANGUAGE. The headings contained in this Agreement are inserted for convenience of reference only and shall not be a part of or control or affect the meaning hereof. The language of this Agreement shall be construed according to its fair meaning and shall not be construed against the party responsible for drafting this Agreement or any provision hereof. Words in this Agreement shall be deemed to refer to whatever number or gender that the context requires. It is the intention of the parties that if any provision of this Agreement is capable of two constructions, one of which would render the provision void and the other of which would render the provision valid, then the provision shall have the meaning which renders it valid.
30. NON-WAIVER PROVISION. No breach or event of default hereunder shall be deemed to have been waived by the City except by a writing to that effect signed on behalf of the City and no waiver of any such breach or default shall operate as a waiver of any other breach or default on a future occasion, or as a waiver of that breach or default after written notice thereof and demand by the City for strict performance of this Agreement. Acceptance of partial or delinquent performance shall not constitute the waiver of any right of the City. All rights, remedies, and privileges of the City hereunder shall be cumulative and not alternative.

The parties have executed this Agreement as of the _____ day of _____ in the year of 2016.

Artist: Benjamin Victor Studios, Inc.


By: Benjamin Victor
Title: owner/CEO

CITY OF TEMPE, an Arizona municipal corporation.

Mark W. Mitchell, Mayor

ATTEST:

Brigitta M. Kuiper, City Clerk

APPROVED AS TO FORM:

Judith R. Baumann, City Attorney